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In the

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, petitioners are nonetheless entitled to a defense of qualified immunity?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondents, Paul and Erma Berger. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of litigating important matters of public interest. PLF has thousands of supporters nationwide and advocates a balanced approach to dealing with public interest issues. PLF supports the concept of limited government and believes public officials must be respectful of the constitutional rights of those whom they serve. Law enforcement personnel have a duty not only to execute the law, but also to protect the civil rights of citizens. Police action that is excessive or unduly intrusive undermines individual liberty and is intolerable in a free society.

This case is a singular example of government excess and intrusion into the privacy of individuals. It calls into question the fundamental protections afforded the people in the Fourth Amendment to the United States Constitution. How this Court answers the questions raised by this case will determine the expectation of privacy we have in our very homes. A consideration of a broad spectrum of perspectives is, therefore, warranted. Pacific Legal Foundation has a long history of amicus participation in this Court and believes its public policy perspective on balancing the needs of law enforcement with individual liberty will provide a necessary viewpoint on the issues presented in this case.

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[1] Pursuant to Supreme Court Rule 37.6, amicus Pacific Legal Foundation states that no counsel for a party to this action authorized any portion of this brief and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Paul and Erma Berger own a ranch in Montana. In 1993, disgruntled former employees of the Bergers reported to the United States Fish and Wildlife Service (Service) that they had seen Mr. Berger poison protected eagles. An investigation ensued that came to the attention of the media. Reporters for Cable News Network (CNN) approached agents of the Service to work out a television deal. The media wanted footage for their television program "Earth Matters," and the Service wanted publicity of its environmental law enforcement efforts. An Assistant United States Attorney signed a contract with CNN authorizing CNN reporters to accompany United States agents as they executed a criminal search warrant on the Bergers' ranch. Under this contract, CNN would retain exclusive editorial control of any video and voice recordings of the event.

In March, 1993, a magistrate judge issued a sealed search warrant for the Bergers' ranch authorizing a search of all the premises, except the residence. The judge was never apprised of the media contract nor was he informed that the media would join the search. The media participated in a pre-search briefing where the media were provided details of the sealed warrant and supporting documents. At this briefing, law enforcement officers allegedly discussed with the media ways of preventing the Bergers from discovering the reporters were not government agents. On the morning of the search, CNN reporters and government agents descended on the ranch in 10 vehicles. Media cameras mounted on the inside and outside of government vehicles recorded the event. Reporters were dressed in plain clothes, indistinguishable from federal agents. A special agent for the Service was wired with a CNN microphone. As the cars came up the road, Mr. Berger drove out to meet them. Mr. Berger was told by the special agent that he would be served a warrant and that the government was authorized to search

all buildings on his property. The special agent asked if he could accompany Mr. Berger back to the ranch in Mr. Berger's truck so he could explain how the search would proceed. Mr. Berger agreed. The special agent did not tell Mr. Berger that the warrant did not include the house nor did he inform Mr. Berger that he was wearing a hidden microphone and his conversations would be recorded.

At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. Only 10 days prior, Mr. Berger had been released from the hospital after treatment for high blood pressure. He was visibly upset and naturally acquiesced when the special agent asked him if he could come into his home. Thus began an all-day search of the Berger ranch that involved threats of imprisonment if the Bergers did not cooperate, staged photo shoots, on-camera interviews by federal agents on the Berger property whereby the agents made derogatory comments about the Bergers, and planned diversions so the Bergers would not discover the presence of the media. On one occasion, Mr. Berger objected to the presence of video cameras. Federal agents responded by redirecting the cameras and interrogating the Bergers with strongly worded leading questions while surreptitiously taping the answers. Apparently, to add some drama to the affair, the Assistant United States Attorney wore an ATF hat. Although no convincing evidence was ever discovered of poisoned eagles, Mr. Berger was charged with a few felony counts of killing protected species and a misdemeanor count of using a pesticide not in accordance with its labeling. Mr. Berger was acquitted on the felonies but convicted on the misdemeanor. A highly edited version of the video and audio tapes, implying that the Bergers had killed hundreds of eagles, was aired on CNN at least 10 times and shown internationally.

The Bergers filed a civil suit against the agents and the media for violating their civil rights, trespass, and intentional infliction of emotional distress. The Ninth Circuit Court of Appeals ruled the search was patently unreasonable and held the

agents liable. The court also ruled that the media had trespassed in violation of state law and may be liable for emotional distress. The court refused to enjoin further airings of the video.

SUMMARY OF THE ARGUMENT

Any unnecessary intrusion in the execution of a warrant violates Fourth Amendment privacy rights. As this Court has stated, the principle objective of the Fourth Amendment is to protect individual privacy from government intrusion. This protection is afforded by the warrant requirement. By the Fourth Amendment's express terms, no warrant may issue except for probable cause based on sworn affidavit. The warrant must also specify with particularity the places, things, and persons to be searched or seized.

This Court has warned that public officials must take care to assure that searches and seizures are conducted so as to minimize the intrusion. This implies a limitation not only on how the warrant is executed but on who may execute it. Consequently, where warrants are required, home invasion must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. In this case, the warrant did not address media involvement because law enforcement officers withheld their media plans from the magistrate. Nor was the presence of the media determined to be reasonably necessary to the execution of the warrant. Therefore, the presence of the media unduly and substantially expanded the intrusion into the Bergers' privacy in violation of the Fourth Amendment. Fourth Amendment values dictate that governmental intrusions be minimal and reasonably necessary to the execution of the warrant.

Media involvement in the execution of a warrant maximizes the intrusion. While there were only 3 CNN reporters to the 21 law enforcement officers on the Bergers' property, their impact

on the Bergers' privacy was anything but marginal and insignificant. The audio and video tapes CNN took of the search were broadcast repeatedly to both national and international audiences. Moreover, these tapes were edited to show the Bergers as scofflaws who maliciously killed protected wildlife, although they were never convicted of such crimes. Further, federal law enforcement officers invited the media onto the Bergers' private property in violation of state trespass laws. Consequently, the impairment to the Bergers' privacy occasioned by the presence of the media could not have been greater.

Additionally, the purported accomplishment of some law enforcement purpose does not justify the expanded intrusion by the news media in observing and recording the execution of a warrant. Empirical evidence demonstrates, in this and other cases, that the presence of the media is just as likely to generate police grandstanding and misconduct as it is to deter violence and crime. Therefore, the media perform no legitimate police purpose when they accompany law enforcement officers in the execution of a warrant. Private news media coverage is not reasonably necessary to the execution of the warrant and should not be allowed.

Furthermore, the media have no more right than the general public to observe and record the execution of a warrant. They can be excluded from private property. Therefore, this Court should not allow a warrant to become a press pass. Instead, this Court should resolve that law enforcement officers must minimize impairment to the constitutionally protected right to privacy.

ARGUMENT

I

ANY UNNECESSARY INTRUSION IN THE EXECUTION OF A WARRANT VIOLATES FOURTH AMENDMENT PRIVACY RIGHTS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const., amend. IV.

This constitutional amendment is an extension of English tradition and jurisprudence and embodies the core value that the home is sacrosanct. *See Wilson v. Layne*, 141 F.3d 111, 121 (4th Cir. 1998). In recognition of fundamental privacy and property rights, as early as the *Semayne's Case*, 77 ENG. REP., No. 194 (K.B. 1604), the King's Bench declared that the "house of every one is to him as his castle and fortress," *id.* at 195, and prohibited the government from forcibly entering a home at the behest of a private party. *Id.* at 198. It is ironic, therefore, that this Court must now decide whether the law prohibits the government from forcibly entering a home *with* a private party.

A. Fourth Amendment Values Dictate That Governmental Intrusions Be Minimal and Reasonably Necessary to the Execution of the Warrant

As this Court stated in *Silverman v. United States*, 365 U.S. 505 (1961):

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

Id. at 511.

"The protection of privacy from encroachment by government officers is the 'principle' object of the [Fourth] Amendment." *Ayeni v. Mottola*, 35 F.3d 680, 684 (2nd Cir. 1994) (citing *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)). This right of privacy is assaulted everytime the government enters private property. Is it any wonder then that the Fourth Amendment expressly prohibits unreasonable searches and seizures and requires the protection of an authorized warrant?

But if this warrant requirement is to protect against undue governmental impairment of the right of privacy and the sanctity of the home, it must have meaningful limits. The Framers of the Constitution clearly intended such limits. This warrant requirement is not like the writs of assistance that authorized agents of the Crown to search as they pleased and were so odious to the

American colonists.[2] Rather, these warrants are bounded by the exacting requirements of the Fourth Amendment.

The Framers required all warrants to be obtained on probable cause supported by sworn affidavits. To further protect individual rights of privacy and property, the Framers also required all warrants to describe with particularity the place to be searched and the persons or things to be seized. U.S. Const., amend. IV.

In recognition of these strict requirements, this Court has long recognized that an entry into the home without a warrant (with few exceptions) is per se unreasonable and, therefore, unconstitutional. *See Payton v. New York*, 445 U.S. 573, 588-90

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[2] Writing for the Court in *Stanford v. Texas*, Justice Stewart explained:

> "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.' 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'"

Stanford v. Texas, 379 U.S. 476, 481-82 (1965) (quoting *Boyd v. United States*, 116 U.S. 616 (1886)).

(1980); and *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

The Framers took great pains to ensure our protection from unnecessary intrusion. They saw firsthand the dangers attendant to overbearing and arbitrary government. To avoid these dangers, they drafted a Fourth Amendment designed to minimize governmental impairment of individual rights. With good reason, this Court has admonished that "responsible officials, including judicial officials, must take care to assure that [searches and seizures] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andersen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Minimizing intrusions necessarily requires a limitation on *who* may execute the warrant as well as *how* the warrant may be executed.

According to the Second Circuit in *Ayeni*:

> With respect to express authorization, a warrant identifies not only the premises that may be searched and the items that may be examined or seized, but also *the officers who are authorized to participate in the search and seizure*.

Ayeni v. Mottola, 35 F.3d at 685-56.

As a limit on those who may accompany law enforcement officers in the execution of a warrant, this interpretation of Fourth Amendment requirements has been codified in federal statutory law:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person*, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (emphasis added).

This straightforward statute makes clear that law enforcement officers may not bring along third parties in the execution of a warrant except in the limited circumstance where the third party is needed to aid the officers. According to the Second Circuit, the type of aid envisioned by this statute is actual assistance in conducting the search.

In *Ayeni v. Mottola*, secret service agents entered the home of Mr. and Mrs. Ayeni with a warrant to search for evidence of credit card fraud on the part of Mr. Ayeni. These agents were accompanied by a CBS television crew for "Street Stories." Mr. Ayeni was not home. However, Mrs. Ayeni, who was not a suspect, was in the home with her young son. She was clad only in a dressing gown. Mrs. Ayeni objected to the videotaping of herself and her son. At one point she even tried to avoid the CBS camera by covering her face with a magazine. Her son was crying, and he told his mother he was frightened. When Mrs. Ayeni attempted to cover her son's face with a magazine, a special agent grabbed the magazine out of her hand, threw it on the floor, and told them to "shut up." This same agent directed the camera crew to video tape Mrs. Ayeni's face while he questioned her about her husband. *Ayeni v. Mottola*, 35 F.3d at 683.

The Second Circuit found this search patently unreasonable and in clear violation of both the Fourth Amendment and statutory law. The court noted with asperity that CBS was not assisting the agents in conducting the search. "On the contrary, the officers were assisting CBS in producing a television show." *Id.* at 687. So it is in the present case.

The Assistant United States Attorney had a signed agreement with CNN to allow video and audio taping of the search at the Bergers' ranch. As in *Ayeni*, the purpose of these recordings was to provide footage for a television show and not to aid the officers in the search:

> In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute--the execution of a warrant--for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation.

Berger v. Hanlon, 129 F.3d 505, 515 (9th Cir. 1997).

The responsible officials in these cases, and many others, did not follow the admonition of this Court to "take care to assure that [searches and seizures] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *See Andersen v. Maryland*, 427 U.S. at 482 n.11. Rather, in violation of Fourth Amendment protections, the law enforcement officers did their best to *maximize* the intrusion by bringing along the media who can and will broadcast all they hear and see to the world.

Both law enforcement and judicial officers are in need of a workable standard more clearly defining the constitutional limits of searches and seizures. This Court has been asked to answer the question whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant. To comport with the intent and language of the Fourth

Amendment, the answer to that question must seek to minimize privacy intrusions.

According to the Second Circuit:

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

Ayeni, 35 F.3d at 688.

This is a workable standard and one not inconsistent with Supreme Court jurisprudence. *See Payton v. New York*, 445 U.S. at 602-03; and *Michigan v. Summers*, 452 U.S. 692, 705 (1981). Moreover, this standard is endorsed by the Ninth Circuit in this case (*see Berger*, 129 F.3d at 510-11) and the dissent in *Wilson* (*see Wilson v. Layne*, 141 F.3d at 119). This standard is also impliedly codified in 18 U.S.C. § 1305. Fourth Amendment values dictate that forcibly executed invasions of private property under purported authority of government warrants be minimal and reasonably necessary to the execution of the warrant.

Although law enforcement officers require some latitude in the execution of a warrant, the requirement that the invasion be grounded in the express terms of the warrant prevents government overreaching and protects core Fourth Amendment values. As this Court has stated:

> The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security

> and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Payton v. New York, 445 U.S. at 586 n.24 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

In *Berger*, law enforcement officers obtained a warrant to search the Berger property without disclosing the media contract, the planned presence of the press, or the media's purpose. Therefore, the warrant did not expressly address media involvement in the execution of the warrant, either as active participants or as passive observers. Nor was the media presence reasonably necessary to the execution of the warrant. To the contrary:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement.

Berger, 129 F.3d at 510.

It has been established since the early seventeenth century that "[e]ven a duly authorized officer could not execute a warrant to further the purposes of a private individual." *Buencore v. Harris*, 656 F.3d 347, 354 (4th Cir. 1995) (citing *Semayne's Case*, 77 Eng. Rep. at 198); *Burdett v. Abbot*, 104 Eng. Rep. 501, 560-61 (K. B. 1811)). This Court should not allow law enforcement officers to advance the private pecuniary interests of the media, and unnecessarily erode the delicate privacy and property rights of citizens, by allowing the media to accompany them in the execution of a warrant.

B. Media Involvement in the Execution of a Warrant Maximizes the Intrusion

Petitioners downplay the media intrusion in this case. They argue that the presence of CNN reporters at the Berger ranch was marginal and insignificant:

> [T]o the degree the Bergers allege a privacy interest which was invaded by the reporters' *presence* during the execution of the warrants, the incremental impact of having twenty-four people (including three journalists) instead of twenty-one (the FWS warrant execution team) witness the execution of the warrant . . . should not impact the constitutional balance. In other words, the incremental harm of having three civilians observing what twenty-one law enforcement officers already are viewing does not outweigh the significant public interests served by the presence of neutral journalists.

CNN brief at 38.

Putting aside CNN's undeserved claim of neutral journalism, this argument borders on the ludicrous. CNN's incremental impact was not merely three journalists, but the whole world. The video and audio tapes CNN recorded during the course of the search on the Bergers' private property were broadcast repeatedly to national and international audiences. The object of these broadcasts was to maximize dissemination of private information about the Bergers that was obtained by CNN only by use of the coercive power of government to compel the Bergers to grant CNN access. Moreover, these tapes were not allowed to speak for themselves. They were edited to imply more than they showed. The Bergers were portrayed by CNN as scofflaws who killed scores of protected eagles although Mr. Berger was never convicted of such a crime. Joint Appendix (App.) at 127. Consequently, the impairment to the Bergers' privacy could not have been greater.

But further insult was added to the Bergers' constitutional injury when the media broke state trespass law--with the collusion of law enforcement officers--by entering the Berger property without their consent or knowledge.

The Ninth Circuit held the media violated generally recognized principles of trespass law in the State of Montana when they accompanied federal agents in the execution of a warrant on the Berger property. *Berger*, 129 F.3d at 517. Contrary to the district court that had found there was no trespass because the government was "in control of the premises" when it searched the Berger ranch with the media, the Ninth Circuit ruled "such control does not authorize law enforcement officers to invite third parties on the premises for reasons unrelated to law enforcement." More specifically, the court held: "The warrant therefore does not justify the media intrusion here, because the officers invited the media for newsgathering, not for law enforcement." *Id.* at 516.

The parties agree that the media have no right to accompany the police in the execution of a warrant and can do so only when authorized by law enforcement officers. *See* CNN brief at 28. As amici ABC, *et al.*, point out, "media representatives are typically permitted to observe searches and seizures only at the sufferance of law enforcement officials." Amici ABC brief at 8. In this case, law enforcement officers not only granted permission for the media to trespass on private land, but conspired to hide the media's presence from the Bergers during the search.

It would be strange indeed if government officials were constitutionally authorized to conspire with the media, or any third party, to violate state law in the execution of a warrant. This type of government behavior simply cannot fall within the ambit of reasonable searches under the Fourth Amendment. Media involvement in the execution of a warrant without the informed consent of the property owner always magnifies the

intrusion. This is contrary to the goal of the Fourth Amendment to minimize impairment to the right of privacy.

II

THE PURPORTED ACCOMPLISHMENT OF SOME LAW ENFORCEMENT PURPOSE DOES NOT JUSTIFY THE EXPANDED INTRUSION OF THE NEWS MEDIA IN OBSERVING AND RECORDING THE EXECUTION OF A WARRANT

Petitioners would have this Court believe that the media always serve a legitimate law enforcement purpose. They suggest, for example, that media observation and recording of the execution of a warrant necessarily enables public oversight of law enforcement, deters crime, and curbs potential police misconduct. *See* CNN brief at 10. This is patently untrue. The media certainly did not serve these laudable functions in this case or in the *Wilson* and *Ayeni* cases. Rather, they served only their own mercenary interests.

It is hard to comprehend how CNN enabled oversight of law enforcement in this case when CNN was anything but a neutral observer. As the Ninth Circuit found, CNN was seeking entertaining footage for its environmental television show. To that end, CNN staged photo shoots and sought provocative soundbites. *See Berger*, 129 F.3d at 515. CNN even edited the audio and video tapes for television to imply the Bergers killed hundreds of eagles when the evidence did not back up those accusations. *See* Joint App. at 127.

The presence of CNN did not deter crime in this case but precipitated it. The federal officers who allowed CNN to accompany them to execute the warrant violated a federal statute prohibiting third party involvement except in aid of the search. *See* 18 U.S.C. § 1305. Also, CNN itself committed the crime of trespass when it entered the Bergers' private property and surreptitiously recorded the Bergers' conversations in their home without their consent.

Finally, the media did not deter police misconduct. Rather, the presence of the media induced police misconduct. For example, prior to the search, the media were illegally given information relative to the search and investigation that was under seal by the court. *See Berger*, 129 F.3d at 515. Moreover, the federal agents were more intent on playing to the cameras than on conducting a search. *Id.*

In *Wilson*, the companion case to *Berger*, two reporters accompanied the police as they entered the home of Mr. and Mrs. Wilson to execute an arrest warrant for their son. The subject of the warrant was not found in the home but news reporters took snapshots of Mr. Wilson as he was wrestled to the floor of his living room in his underwear with a police gun at his head. They also took pictures of Mrs. Wilson as she entered the living room from the bedroom dressed only in a shear nightgown. Although the Fourth Circuit proposed hypothetical reasons for the reporters' presence in the Wilson home, such as affording protection to the officers or facilitating accurate reporting, the dissent correctly remarks that these reasons are not "sufficiently necessary to the execution of an arrest warrant to justify the undermining of the sanctity of the home . . . ." *Wilson*, 141 F.3d at 132.

The unnecessary presence of a CBS camera crew in the *Ayeni* case particularly rankled the Second Circuit. The court was outraged at the boorish conduct of special agents when they intruded into a home looking for evidence of credit card fraud. When the woman of the house tried to cover her crying son's face with a magazine, a federal agent took the magazine out of her hand, threw it to the floor and told them to "shut up." He then directed the camera crew to film the woman's face while he questioned her. To these antics, the Second Circuit declared: "A private home is not a soundstage for law enforcement theatricals." The court further remarked:

> The unreasonableness of the [agent's] conduct in Fourth Amendment terms is heightened by the fact

> that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect--the right of privacy. The purpose of bringing the CBS camera crew into the Ayeni's home was to permit public broadcast of their private premises and thus magnify needlessly the impairment of their right to privacy.

Ayeni, 35 F.3d at 686.

As evidenced by these cases, the presence of the media is just as likely to generate police grandstanding and misconduct as it is to deter violence and crime. As a general proposition, it does not follow that the media necessarily perform a legitimate police purpose when they accompany law enforcement officers in the execution of a warrant. Even if they did, this would not suffice to justify law enforcement officers in allowing the media to accompany them and to observe and record their execution of a warrant, because the presence of the news media is not reasonably necessary to the execution of the warrant. Moreover, if the presence of the media were justified, because the media could accomplish some general law enforcement goal such as public oversight of law enforcement, the presence of the media could be justified in any police action or investigation, not just the execution of a warrant. However, the Framers apparently believed that public oversight of law enforcement was adequately addressed in the Sixth Amendment requirement of a public trial.

Nevertheless, petitioners argue that "government execution of a warrant is not a private event . . . ." CNN brief at 47. This is only half true. While neither the subject of the warrant nor law enforcement officers can preclude the news media from covering a story, they can exclude the media from private property. The right of a landowner to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). As noted above, the media transgressed the law of trespass when they entered the Berger property and invaded their home with a hidden microphone.

This right to exclude forms the very basis for Fourth Amendment privacy protection. This means the news media, like the rest of the general public, may stand on a public street or sidewalk and record the event from that vantage point, but they cannot invade private property without the owner's consent.

As Justice White pointed out in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information *not available to the public generally*." *Id.* at 684 (emphasis added).

In *Branzburg*, a newspaper reporter was held in contempt for refusing to divulge to a grand jury his personal knowledge of criminal acts that he had obtained in pursuit of a story. In addressing the right of the reporter to withhold such information, this Court reviewed certain purported press privileges and concluded, among other things:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster *when the general public is excluded* . . . .

Branzburg v. Hayes, 408 U.S. at 684-85 (emphasis added).

By this reasoning, the media have no more right than the general public to observe and record the execution of a warrant. While "government execution of a warrant is not a private event," the warrant is not a license to turn a home into an open house, or, as the court noted in *Ayeni*, "[a] private home is not

a soundstage for law enforcement theatricals." *Ayeni*, 35 F.3d at 686.

CONCLUSION

The Fourth Amendment to the United States Constitution guarantees that the sanctity of the home and the fundamental right to privacy will not be abridged except by warrant or "exigent circumstances." CNN was not mentioned in the warrant nor was its presence reasonably necessary to execute the warrant. CNN accompanied federal agents only for its own commercial purposes. When law enforcement officers orchestrate the entry of third parties, including the media, onto private property without the consent of the owner, "without the authorization of a warrant, for no legitimate law enforcement need and justified by no exigent circumstances, they violate the clearly established protections of the Fourth Amendment." *Wilson*, 141 F.3d at 132.

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Respectfully submitted,

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